United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7213

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-7213

TO BE ARGUED BY
THOMAS M. BREEN

AMALIA HEBIRA ZORIANO SANCHEZ,
etc., et al,

Plaintiffs - Appellants.

-against-

CARIBBEAN CARRIERS LIMITED,
BORDAS DOMINICAN CO.
BORDAS & COMPANY and
BORDAS CORPORATION,

Defendants - Appellees.

On Appeal from the United States District Court for the Southern District of New York.

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

THOMAS M. BREEN
Attorney for Plaintiffs-
Appellants.
160 Broadway
New York, New York 10038
BEekman 3-3740

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The Appellants submit the following reply brief.

COMMENTS CONTAINED IN THE NATURE OF CASE, AS SET OUT IN PAGES 3 to 5 OF THE BRIEF OF THE DEFENDANTS-APPELLEES ARE NOT ACCURATE.

In the Puerto Rico action between the same parties (35a-40a), the issues are not identical with those presented in this case. For example, the three directors and stockholders of CARIBBEAN CARRIERS LIMITED were Byron King Callan (U.S. citizen), Luis Manuel Bordas (dual American and Dominican citizenship) (65a); and Diego Bordas (U.S. resident). Diego Bordas swore on October 7, 1955 that he resided in Forest Hills, Queens County, New York (66a); Acacia No. 5 Newport, San Juan, Puerto Rico on February 8, 1968 (101a); Acacia No. 5, Newport, San Juan, Puerto Rico on February 27th, 1969 (110a). When U.S. residents and U.S. citizens own the shipping company, American law is applicable when a case is brought to recover damages for personal injuries and death.

Secondly, the plaintiffs in this action have pleaded a claim under the 1958 Geneva Convention and Liberian law (17 - 18a, 14a - 19a).

In the third place, the address of CARIBBEAN CARRIERS LIMITED before the attempted sale of the S.S. CARIBE, was in care of Bordas & Co. Apartado 4615, Acacia No. 5,URB., Monterrey, Pueblo Viejo, San Juan, Puerto Rico 00902 (62a). This is another instance of the close relationships among the defendants.

Furthermore, the plaintiffs have shown extensive financial transactions by CARIBBEAN CARRIERS LIMITED, in New York in order to keep the M.V. CARIBE operating.(70a -115a).

In addition, the plaintiffs have shown that the attempted transfer of the vessel to Dominican registry was ineffective. The vessel was carried on the Liberian registry until October 22, 1971 - about 12 days after the vessel sank (69a). At page 122a is defendants' exhibit "F" on permission to transfer a Liberian vessel. The exhibit indicates that the permission will be null and void at the end of 90 days from April 22, 1971 - the voiding occurred on July 22, 1971 because the ship-owner did not turn in the certificate of registry and the ship radio station license in order to have the registry certificate cancelled. The second paragraph of 122a shows that the transfer to the Dominican registry was without change of ownership.

These five elements supply the preconditions and the substantial contacts required for the application of the Jones Act (46 U.S.C.A. 688).

In contradiction to the first sentence in the first paragraph of page 2 of the brief of the defendants, their motion in Puerto Rico was labeled as a "Motion to Dismiss for Lack of Jurisdiction". In their motion dated June 8th, 1972,the defendants did not make a motion to dismiss on the ground of forum non conveniens. In paragraph 4 of the same motion, the defendants stated the following:

"That considering the above, the Court should not exercise jurisdiction over the subject matter of this suit."

The plaintiffs disagree with the statements in the third paragraph of page two of the brief of the defendants. In a motion dated December 19, 1972 in the Puerto Rico action the defendants requested: "WHEREFORE, defendants pray that the Court limit discovery to evidence which may produce more facts upon which the Court can decide whether defendants motion to dismiss for lack of jurisdiction should be granted and at this time not allow discovery which goes towards the merits of the case."

STATEMENTS IN "THE RELEVANT FACTS" AT PAGE 5 OF THE DEFENDANTS' BRIEF DO NOT GIVE A TRUE AND COMPLETE PICTURE.

In the second paragraph of page 3 of this reply brief, the plaintiffs have sketched the story on the Liberian registry of the M.V. CARIBE. Defendants exhibit "F" (122a - 2nd paragraph) indicates that the attempted transfer to Dominican registry and flag was intended to be without change of ownership.

Diego Bordas was a resident of the United States (66a, 101a, and 110a).

With reference to the ownership of the M.V. CARIBE, CARIBBEAN CARRIERS LIMITED was still the owner at the time the vessel sank on October 10, 1971 (17a, 18a, 69a).

In opposition to the statement of the base of operations of the vessel, plaintiff states that the base of operation was in Puerto Rico (62a).

FIRST POINT

BECAUSE SOME PRE-CONDITIONS - SUCH AS U.S. OWNERSHIP OF THE VESSEL WERE NOT BEFORE THE PUERTO RICO DISTRICT COURT, THE DISMISSAL OF THE PUERTO RICO ACTION WAS NOT ON THE MERITS, AND PLAINTIFFS CAN INSTITUTE THE PRESENT LAWSUIT.

At page 2 of this reply brief, the plaintiffs demonstrated the existence of American control through directors and stockholders in the defendant CARIBBEAN CARRIERS LIMITED.

In Antypas v. Cia Maritima San Basilio, S.A. et al (Docket No. 75-7672, No. 726, decided by this Court on August 2, 1976), this Court cited with approval, the statement in another case that American citizenship of some of the stockholders of the shipowner was sufficient to warrant the application of the Jones Act,(page 5133 of Slip opinion).

Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970)- the Supreme Court held that the Jones Act applied although the controlling stockholder of the shipowning company was a permanent resident of the United States, and not a U.S. citizen.

Through listing other substantial contacts at pages 2 and 3 of this brief, the plaintiffs have furnished the preconditions necessary for the application of the Jones Act (46 U.S.C.A. 688).

The Puerto Rico action determined only that the Court did not have jurisdiction because the plaintiffs did not supply the preconditions necessary for jurisdiction. The Court did not determine the merits of the claim of the plaintiffs.

As the Supreme Court of the United States noted in its opinion in Costello v. United States 365 U.S. 265, 286 (1960):

"*** 'If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." See also House v. Mullen, 22 Wall, 42, 46; Swift v. McPherson, 232 U.S. 51, 56; St. Romes v. Levee Steam Cotton Press Co., 127 U.S. 614, 619; Burgett v. United States, 80 F. 2d 151; Gardner v. United States, 71 F. 2d 63.

We do not discern in Rule 41 (b) a purpose to change this common-law principle with respect to dismissals in which the merits could not be reached for failure of the plaintiff to satisfy a precondition."

The dismissal in Puerto Rico because of the failure to demonstrate the necessary preconditions did not bar another action. In this second action, the allegations on pages 2 and 3 of this brief, demonstrate the preconditions and substantial contacts needed to apply the Jones Act.

On page 7 of their brief, the defendants refer to Angel v. Bullington, 330 U.S. 183, 190, and on page 11 they refer to American Surety Co. v. Baldwin, 287, U.S. 156, 166 (1932). After reading both these cases, we can see that the parties submitted their whole case to State Courts which had jurisdiction of all the claims. After the State Courts had jurisdiction, the parties could not re-open their cases in the Federal Courts. On the contrary, the plaintiffs in Puerto Rico were told that the District Court did not have jurisdiction of their claims at the threshold of the suit because they could not meet preconditions which would enable them to have a decision on the merits.

The citation of Vassos v. Societa Trans-Oceanica Canopus, 143 F. Supp. 945, 946 (S.D.N.Y.) affirmed 272 F. 2d 182 (2Cir. 1959), appears at page 8 of the brief of the defendants. In the District Court, the case against the shipowner was dismissed because of the Statute of Limitations and the refusal of the District Court to accept jurisdiction. In the second suit, the plaintiff did not show any new substantial contacts and the determination on the Statute of Limitations was enough to compel affirmance. That situtation does not exist in this case.

SECOND POINT

LIBERIAN MARITIME REGULATIONS AND LAW AS WELL AS INTERNATIONAL LAW CONTROL THE TRANSFER OF THE M.V. CARIBE.

When American citizens placed the M.V. Caribe under the Liberian flag, they agreed that the operation and transfer of the vessel would be controlled by Liberian law (17a). In the Liberian Maritime regulations, a definite procedure exists for the foreign transfer of a Liberian ship. The owners of the M.V. Caribe did not obtain a certificate of cancellation from the Liberian registry, nor did they surrender the ship radio station license or the vessel's certificate of registry, (17a).

The 1958 Geneva Convention sets forth the rules of International Law on the legal transfer of registration of vessels (17 - 18a). The purpose of these rules is to avoid the existence of pirate ships (Article 18 - 18a). These are regulations designed to clarify orderly transfers of international ships and do not relate solely to U.S. enrollment statutes.

The United States, in addition, is very much concerned about the social aspect of the Jones Act (46 U.S.C.A. 688), both as a means of providing safe working conditions for seamen and as a means to equalize competition between American flag owners and those U.S. citizens and residents who want to own foreign flag vessels.

As citations in support of the statements in the last paragraph of page 9, Hellenic Lines v. Rhoditis, 398, U.S. 306, 310 (1970); Monteiro v. Sociedad Maritima San Nicolas, S.A., 280 F. 2d 568, 573 (2 Cir. 1960).

THIRD POINT

THE PLAINTIFFS BEGAN THEIR LAW SUITS WITHIN THE PROPER TIME LIMIT.

The trial judge in this action did not rule on the defense of the Statute of Limitations (125a).

The plaintiffs began their action in Puerto Rico on January 21, 1972. On April 17th, 1975 the Puerto Rico Court issued its opinion. While an appeal was pending in the Court of Appeals of the First Circuit from the opinion and order of April 17, 1975, this action was begun on August 21, 1975.

Because the original action was begun within one year, the defendants cannot claim that this New York suit is barred by the Statute of Limitations.

The Jones Act was based in part on the Federal Employers' Liability Act, 45 U.S.C. 51 et seq. In Burnett v. New York Central Railroad Co. 380 U.S. 424, the plaintiff started his case in an Ohio Court under the FELA before the expiration of the three year limitation. The action was dismissed because of improper venue. Then the injured man began an FELA action in the Federal Court eight days later and after the expiration of the three year period. The Supreme Court reversed the Court of Appeals and held that the action was timely.

This excerpt is from page 426 of the opinion of the United States Supreme Court:

"There is no doubt that, as a matter of federal law, the state action here involved was properly "Commenced" within the meaning of the federal limitation statute which provides that "no action shall be maintained . . . . . unless commenced within three years from the day the cause of action accrued." As this Court held in Herb v. Pitcairn, 325 U.S. 77, 79, "when process has been adequate to bring in the parties and to start the case on a course of judicial handling which may lead to final judgment without issuance of new initial process, it is enough to commence the action within the federal statute." Had Ohio law permitted this state court action simply to be transferred to another state court, Herb. v. Pitcairn holds that it would have been timely. The problem here, however, is that the timely state court action was not transferable under Ohio law but, rather, was dismissed, and a new action was brought in a federal court more than three years after the cause of action accrued. Nonetheless, for the reasons set out below, we hold that the principles underlying the Court's decision in Herb v. Pitcairn lead to the conclusion that petitioner's state court action tolled the federal limitation provision and therefore petitioner's federal court action here was timely."

The reasoning of the Burnett opinion applies to this case and the statute of limitations is not a bar to this action. The Puerto Rico action tolled any limitation provisions and the action in the Southern District of New York was timely.

With reference to the defense of laches, the plaintiffs did institute a timely lawsuit and the defendants have shown no damage because of the later commencement of the New York lawsuit.

FOURTH POINT

DECLINATION OF JURISDICTION INDICATES THAT THE DISTRICT COURT WILL NOT REACH THE MERITS OF THE CASE

The first point of this reply brief exhibits the preconditions that exist, so that the Jones Act (46 U.S.C.A. 688) is applicable.

In declining jurisdiction, the Court means that it does not have the power to pass on the controversy; and that the Court will not decide the merits in the lawsuit. At pages 2 and 3 the plaintiff has supplied the preconditions - the necessary facts so that the Court can exercise jurisdiction in this case.

In declining jurisdiction, the District Court of Puerto Rico did not intend that the plaintiffs could not bring a subsequent lawsuit. Rule 41 b of the Federal Rules of Civil Procedure gives the plaintiffs that right, (text of rule at page 17 of opening brief).

In the Antypas case (Docket No. 75-7672, No. 726, 2 Cir., August 2, 1976), this Court stated that where the Jones Act applies, a District Court has no power to dismiss on grounds of forum non conveniens. In support of this holding, the Court cited Bartholomew v. Universe Tank Ships, Inc., 263 F. 2d 437, 443 (2 Cir. 1959)

The defendants cite the case of United States v. Eastport Steamship Corporation 255, F. 2d, 795, 803 (2 Cir. 1958, at page 11 of their brief.

In the Second Circuit case, this Court held that the U.S. Court of Claims had decided that it had jurisdiction over the parties and the case in the Court of Claims. Since a competent Court had decided that it had jurisdiction, the Government could not attack that jurisdiction in the lawsuit in the Second Circuit. That state of facts is completely different from the determination in the Puerto Rico action where the Court decided to refuse to entertain jurisdiction of the Puerto Rico lawsuit.

FIFTH POINT

FACTS ARE IN DISPUTE IN THIS CASE; FURTHER DISCOVERY SHOULD BE PERMITTED BECAUSE SUMMARY JUDGMENT IS NOT THE PROPER REMEDY.

In opposition to the statements at Point V of the brief of the defendants at page 11, the plaintiffs state that the following are the true facts:

1. and 2. Caribbean Carriers Limited was the owner of the M.V. Caribe and not Bordas Linea Dominicana (69a, 122a, 17-18a).

3. The proper flag for the M.V. Caribe was the Liberian Flag (17-18a,69a, 122a)

4.5, and 6. The plaintiff desires to take the testimony of Diego Bordas on these issues.

7. The base of the ship's operation was San Juan, Puerto Rico (62a).

8. Plaintiff wants to take the testimony of Diego Bordas on this issue.

The issues as set forth by the defendants are disputed by the plaintiffs. This is not a case for summary judgment - Heyman v. Commerce and Industry Insurance Co. 524 F. 2d, 1317 (2 Cir. 1975). After further discovery, the facts will either warrant the application of the Jones Act or they will not. Bartholomew v. Universe Tank Ships Inc. 263 F. 2d,437, 443 (2 Cir. 1959).

CONCLUSION

THE JUDGMENT BELOW SHOULD BE REVERSED AND THE CASE REMANDED TO THE DISTRICT COURT FOR FURTHER DISCOVERY AND PROCEEDINGS

Respectfully submitted,

THOMAS M. BREEN
Attorney for Plaintiffs-Appellants
160 Broadway
New York, New York 10038
BEekman 3-3740